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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ABE R. SCHWARTZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Third Circuit erred in holding that the evidence against Petitioner was sufficient to uphold Petitioner's conviction for conspiracy to violate the *Hobbs* Act, where the evidence showed that Petitioner did nothing more than refer an undercover informer to a co-defendant and "vouch" for the informer's *bona fides*, where a prior decision in the Third Circuit held such evidence to be insufficient as a matter of law.

2. Whether a most substantial disparity of evidence presented against co-defendants in a multi-defendant conspiracy trial can, in itself, require severance in order to insure the due process rights of the moving party, and, if so, whether the Court of Appeals erred in holding otherwise in the circumstances of this case.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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OPINIONS BELOW

A copy of the Judgment and Commitment Order of the United States District Court for the Eastern District of Pennsylvania dated August 1, 1983 is contained in Appendix A. The Opinion and Judgment of the Court of Appeals for the Third Circuit was filed on March 12, 1984, and has not been published. A copy thereof is contained in Appendix B. The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania is contained in Appendix C. A copy of that portion of the Government's Reply Brief on Appeal, referred to by the Court of Appeals in its Order, is contained in Appendix D for this Court's convenience.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered and dated on March 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This is a Petition for Certiorari arising from the following facts. On May 16, 1983, Petitioner was found guilty in the United States District Court for the Eastern District of Pennsylvania, after a jury trial, of conspiracy to violate the *Hobbs* Act in violation of 18 U.S.C. §1951. Petitioner was charged only in the one conspiracy count of a seventeen count indictment, but was tried jointly with four co-defendants who were charged with and convicted of numerous substantive offenses in addition to the conspiracy. The basis for federal jurisdiction of the District Court was 28 U.S.C. §1291.

Petitioner was sentenced on July 8, 1983 to four (4) years of incarceration and a fine of $10,000. On March 12, 1984, the Court of Appeals for the Third Circuit entered a Judgment affirming Petitioner's conviction.

The narrative of events leading to this Petition are as follows. This was a "police corruption" case involving a 17 count indictment against five Philadelphia police officers including Petitioner. Count one of the indictment, a conspiracy charge, alleged that Petitioner and his four co-defendant police officers conspired to use their official positions to extort pay-offs from businesses in return

for allowing the businesses to operate free from harrassment by the police department.[1] The remaining sixteen counts of the indictment charged various substantive offenses including the actual pay-offs to police. As mentioned, Petitioner was charged in only the conspiracy count and was neither named in, nor connected with, the remaining sixteen substantive counts.

The Government's evidence against Petitioner consisted of testimony by informant Donald Hersing and several recorded conversations between Hersing and Petitioner. This evidence revealed that Petitioner had been social friends with informant Donald Hersing who, unbeknownst to Petitioner, was an undercover government informant. (T — 3-19-30).[2] Before and during the period of the alleged conspiracy, Hersing was operating a modeling studio and was apparently making pay-offs to one officer George Woods.[3] The payments from informant Hersing to George Woods were supposed to insure that Hersing's studios would not be beset by arrests. (T — 1-87-90). There was no contention by the Government nor proof that Petitioner was involved, in any manner, with Woods' extortion, receipt of payments and/or police protection. According to the testimony of informant Hersing, the police harrassment continued even though he had been paying Woods and his partner.

Hersing confided to his friend, Petitioner, that he had been making pay-offs to Woods and complained that arrests continued to occur at his studios despite the fact of these pay-offs. (T — 1-143-145). At this point, Petitioner suggested to Hersing that such payments would

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1. John DeBenedetto was Inspector in command of the Central Police Division. John Smith was a Lieutenant assigned to the Central Police Division. Lawrence Molloy and Vincent McBride were police officers in the Central Division, and Petitioner was a Detective responsible for reviewing gun permit applications at the East Detective Division.

2. "T" refers to the transcripts of trial and is followed by the volume of the transcript and the page number.

3. Woods was a uniform police officer who was *not* a co-defendant in this case. Woods was indicted separately, tried, and found guilty.

probably be better made to high-ranking police officers in order to curtail police harrassment. (T — 1-87-90; 1-143-146).

Petitioner never arranged any meetings for the informant Hersing, nor attended any conspiratorial meetings, nor had any conspiratorial conversations with any of the co-defendants. However, according to the taped recording that was played at trial, alleged co-conspirators Lieutenant Smith and Police Inspector DeBenedetto stated, during a conversation with informant Hersing, that Petitioner had "vouched" for Hersing to Inspector DeBenedetto. The informant testified that he understood "vouching" to mean that he had been represented by Petitioner as being "good people." (T — 3-45-46). Hersing eventually called DeBenedetto and arranged the meeting where the pay-offs were commenced. (T — 1-150-160). Petitioner was not present at this or any other subsequent meeting between Hersing and any of the co-defendants and did not receive any of the pay-off money.

The Government's proof with respect to Petitioner's four co-defendants overwhelmingly demonstrated that they were involved in a massive scheme to collect pay-offs from various prostitutes, pimps, gamblers and private club operators in return for protection from police interference. The Government's case against Petitioner's co-defendants consisted of testimony of some 28 "victim" witnesses concerning over $130,000 in illicit pay-offs. Scores of documents and tapes confirmed the testimony of many of these witnesses.

It was undisputed that Appellant never extorted, asked for, or received any of the pay-off money ($130,000) involved in this case (T — 7-23-34), and none of the 75 documents introduced had any relevance nor was probative with respect to Petitioner. Of the 28 Government witnesses who testified, only three mentioned Petitioner's name, and of those three, only one witness, informant Donald Hersing, argubly offered any incriminating testimony as to Petitioner, as described above.

Petitioner filed a pretrial motion to sever his case from his co-defendants on the grounds that the evidence against the co-defendants was so voluminous in relation to the evidence against Petitioner, that a joint trial would result in a prejudicial "spillover". It was the contention of Petitioner, in pretrial motions, that he would be severely prejudiced by the Government parading some 28 or so extorted witnesses before the jury, all of whom would testify as to their being victimized by the *other* co-defendants in having to make pay-offs or suffer the consequences. In addition, the 75 or so documents submitted into evidence by the Government were in no manner probative to the activities of Petitioner. As mentioned earlier, Petitioner did not receive any of the $130,000. The District Court denied the motion to sever.

At the close of the Government's case, Petitioner moved the District Court for a judgment of acquittal on the ground that the evidence relating to Petitioner was insufficient as a matter of law to support the conspiracy conviction. (T — 6-64-72). The motion was denied and Petitioner was convicted on the conspiracy count, leading ultimately to this petition.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH A PRIOR DECISION OF THE SAME CIRCUIT.

Petitioner argued at trial and on appeal that the evidence presented against him was insufficient as a matter of law to uphold his conviction under the reasoning of the Third Circuit in *United States v. Moses*, 220 F.2d 166 (3d Cir. 1955). The Court of Appeals affirmed Petitioner's conviction, stating simply that "we are satisfied that the evidence was sufficient." (App. B). Petitioner respectfully contends that the factual scenario presented in this case is virtually identical to that presented in *Moses* and that the Third Circuit has therefore rendered a decision in direct conflict with its earlier decision in *United States v. Moses*, which this Court should resolve.

As mentioned in the Statement of the Case, *supra*, the Government's evidence showed that Petitioner and the informant Hersing were social friends before the inception of the alleged conspiracy, that Hersing complained to Petitioner that he (Hersing) was making pay-offs to uniformed officers in return for being allowed to operate his modeling studios without police harrassment, but that the studios were being raided nonetheless. In response to Hersing's complaint, and at Hersing's behest, Petitioner suggested that Hersing might get better results if he paid higher ups, i.e. DeBenedetto, instead of the uniformed officers.

While Petitioner did not arrange or attend any meeting between Hersing and DeBenedetto or any of the co-conspirators, Petitioner did "vouch" for Hersing, describing him as "good people" to DeBenedetto. Petitioner neither asked for, nor received, anything of personal or financial value in exchange for the voucher which enabled Hersing to approach DeBenedetto,[4] and this was the full extent of Petitioner's involvement in this case.

Petitioner submitted below and asserts once more before this Court that the evidence presented was patently insufficient to uphold the conspiracy conviction according to the Third Circuit's decision in *United States v. Moses*, 220 F.2d 166 (3d Cir. 1955), and that the Third Circuit Court of Appeals, by finding otherwise in the circumstances of this case, has rendered a decision in conflict with its earlier ruling in *Moses*.

In *United States v. Moses, supra*, the defendant Moses was approached by two undercover narcotics offi-

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4. While Petitioner received a Betamax recorder from informant Hersing, Hersing testified that, in fact, the Betamax recorder had no connection whatever to the alleged conspiracy (T—3-23, 26-27), and the Government ultimately abandoned its theory that the Betamax was a form of pay-off for Petitioner's alleged conspiratorial activities. The District Court acknowledged this fact (App. C). Petitioner also received "sexual favors" from one of Hersing's prostitutes. However, the incident occurred *before* the inception of the alleged conspiracy and thus could not possibly be considered a "pay-off" in return for Petitioner's actions on behalf of Hersing. (T—1-92-95).

cers who told her that they wished to purchase drugs. Moses responded that she had no drugs available, but offered to introduce the agents to her supplier, who would be visiting her in a half hour. Prior to the arrival of her supplier, Moses actively attempted to contact another source without success. When the supplier finally arrived, Moses introduced him to the agents, told him that the agents were interested in purchasing drugs, and "vouched" for the agents, telling the supplier that they were "alright" to deal with. Moses remained present throughout the meeting between the agents and the drug supplier although she did not directly participate any further. Based on this evidence, Moses was convicted of aiding and abetting the sale of narcotics.

The Third Circuit reversed the conviction, holding that such evidence was insufficient as a matter of law to support the verdict:

> "The undisputed facts show the Appellant acting solely at the behest of the prospective buyers and in their interests. At the buyers' request she did two things to facilitate their purchase. She introduced them to the seller and she *vouched* for their *bona fides. . . . There was nothing to show that she was associated in any way with the enterprise of the seller or that she had any personal or financial interest in bringing trade to him. Although appellant's conduct was prefatory to the sale, it was not collaborative with the seller.* For this reason, the conviction cannot be sustained." *United States v. Moses*, 220 F.2d 166, at 168 (Emphasis added).

Thus, the Third Circuit has held that the mere introduction of and voucher for one party to another for the purpose of an illegal transaction is insufficient to amount to aiding and abetting. *See, also, Morei v. United* States, 127 F.2d 827 (6th Cir. 1942) (Evidence that defendant referred informer to heroin supplier and told informer to mention defendant's name so that supplier would "take care" of informer, was insufficient to uphold conviction); *Robinson v. United States*, 262 F.2d 645 (9th Cir. 1959) (Evidence that defendant referred in-

former to heroin supplier and gave him telephone numbers several times, held insufficient to sustain conviction).

The facts of the present case show that Petitioner did nothing more, and in fact did less, than the defendant in *Moses*, inasmuch as Petitioner never "introduced" Hersing to DeBenedetto, never acted as an "intermediary" between Hersing and DeBenedetto, never attended any meetings between Hersing and DeBenedetto or any of the other co-conspirators, and never himself met with any of the other co-conspirators for any purpose. At most, Petitioner merely referred Hersing to DeBenedetto and vouched for Hersing's *bona fides*. *Moses* clearly holds that such evidence is insufficient to support a conviction for aiding and abetting. Petitioner submits that it is also insufficient to support a conspiracy conviction, since conspiracy requires the *stronger, additional proof* of preconcert and collaboration between the defendant and his co-conspirators. *United States v. Peterson*, 524 F.2d 167, 174 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976).

The only collaboration between Petitioner and a co-conspirator in the present case is Petitioner's vouching to DeBenedetto for informer Hersing. *Moses* holds that such evidence is insufficient to amount to aiding and abetting because it does not show a strong enough association with the enterprise of the principal. *United States v. Moses, supra*, at 169. Since conspiracy requires even more in the way of agreement or connivance than aiding and abetting, such evidence must also be insufficient to prove conspiracy. The only other person with whom Petitioner collaborated in any way was Hersing, the informant, and the law is clear that there can be no conspiracy between a defendant and a Government informant "because it takes two to conspire and the Government informer is not a true co-conspirator." *United States v. Martino*, 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *Sears v. United States*, 343 F.2d 139 (5th Cir. 1965); *United States v. Chase*, 372 F.2d 453 (4th Cir. 1967).

Petitioner submits that the case *sub judice* is therefore even more compelling than *Moses* and required a careful analysis by the Court of Appeals in order to avoid a conflicting opinion within the Circuit. The Court of Appeals' one sentence reply to Petitioner's argument makes no mention of *Moses*, but merely refers the reader to the Government's Reply Brief, in which it was argued that Petitioner's activities were more similar to those of the defendant in *United States v. Atkins*, 437 F.2d 308 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973), than those in *Moses*. (App. D). A short review of *Atkins* proves otherwise.

Initially, it must be noted that the *Atkins* court misinterpreted the facts of *Moses*. In attempting to distinguish *Moses* from the case before it, the *Atkins* court stated that (1) the defendant in *Moses* made no "active effort" to find a drug supplier for the undercover agents, and (2) the defendant in *Moses* was not present when the sale was consumated. *United States v. Atkins*, *supra*, at 312. A reading of *Moses*, however, reveals that when the defendant's regular supplier (one Cooper) did not arrive on time, the defendant tried to call a different supplier (one Mack) to accommodate the agents. Thus, she did make "active efforts" to secure a supplier. *United States v. Moses*, *supra*, at 168. Furthermore, while the defendant in *Moses* was not present at the actual consumation of the sale, she did attend the initial meeting between the agents and the supplier. *United States v. Moses*, *supra* at 198. The subsequent transaction would not have been possible if the defendant had not introduced and vouched for the agents at that meeting.

Even if the *Atkins* analysis of *Moses* was correct, the case is easily distinguished from the case *sub judice*. The defendant in *Atkins* was asked by a seller of heroin if she knew any buyers. The defendant replied that she did not, but proceeded to search for and find a buyer, whom she introduced to the seller. The defendant was present throughout the meeting between buyer and seller, continued to meet with the seller after the consumation of the sale, and complained that she (the

defendant) "had been burned." *United States v. Atkins*, *supra*, 437 F.2d at 311. In holding that this evidence was sufficient to support a conviction for aiding and abetting the purchase of heroin, the Eighth Circuit placed great stress on the fact that the defendant attended meetings between buyer and seller:

> "A logical inference may be drawn that the Appellant was concerned enough about consumating or helping to consumate the purchase of heroin that she went to the bar and introduced (seller) to (buyer). Moreover, it is fair to infer that the Appellant was not only concerned that (buyer) meet (seller) while the Appellant was present . . . but that the Appellant was interested enough in the specifics of the purchase that she remained at the table during (buyer's) conversation with (seller). Once again, it would have been much safer to simply introduce the parties and leave; her continued presence can only be taken as an encouragement to (buyer) to consumate the sale. *United States v. Atkins*, 437 F.2d at 311.

By contrast, Petitioner herein did not actively "search" for someone whom Hersing could pay for protection, and did not "introduce" Hersing to DeBenedetto. More importantly for purposes of *Atkins*, Petitioner never attended any meeting between Hersing and DeBenedetto or any other co-defendants, and never expressed any interest in the financial transactions between them. Petitioner submits that if this case had been analyzed according to the reasonsing of the Third and Eighth Circuits in *Moses* and *Atkins*, the evidence would have properly been held insufficient.

By affirming Petitioner's conviction on sufficiency grounds, the Third Circuit has sanctioned the use of evidence which could not possibly meet the requirement of proof beyond a reasonable doubt, even when viewed in a light most favorable to the Government. To allow the conviction to stand on such inadequate proof, poses substantial due process problems by undermining not only

the prior decision of the Third Circuit, but the right of an accused to have the Government meet its burden beyond a reasonable doubt.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court analyzed and defined the constitutional requirements relating to sufficiency of evidence in the context of a first degree murder conviction where a federal court of appeals reinstituted the defendant's conviction because there was "some evidence" that the murder had been premeditated. Referring to *In Re Winship*, 397 U.S. 358 (1970), this Court held that in a criminal case, due process requires not merely "some evidence" of guilt, but proof beyond a reasonable doubt. Anything less is insufficient:

> "In *Winship*, the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *Id.* at 315 quoting *In Re Winship*, 397 U.S. 358 at 364 (1970).

This Court went on to define that standard as nothing less than a state of "near certitude" by the factfinder as to "every element of the offense:"

> "The standard of proof beyond a reasonable doubt, said the *(Winship)* Court, 'plays a vital role in the American scheme of criminal procedure,' because it operates to give 'concrete substance' to the presumption of innocence, to insure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S. at 363. At the same time, by impressing upon the factfinder *the need to reach a state of near certitude of guilt of the accused*, the standard symbolized the significance that our society attaches to the criminal sanction and thus to liberty itself . . . In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that *no person shall be made to suffer the onus of a criminal con-*

viction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Id. at 315-316 (Emphasis added).

Moreover, the necessity of such proof is not restricted to defendants who are morally blameless; "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson v. Virginia, supra,* at 323-324, and on appeal from such a conviction, it is the duty of the Court of Appeals to "review all the evidence" in order to determine whether the findings of the jury were indeed based upon evidence sufficient to convict. *Jackson v. Virginia, supra,* at 318, 319.

Petitioner submits that the evidence presented against him in this case fell woefully short of proving with "near certitude" Petitioner's guilt as to "every element of the offense." The prejudice resulting from this violation of Petitioner's due process rights on the trial level was repeated on the appellate level when the Court of Appeals disposed of Petitioner's sufficiency argument in a single sentence without reviewing any of the evidence presented, while due process required that the court "review all the evidence" before rendering judgment. *Jackson v. Virginia,* 443 U.S. 307, 318-319 (1979).

For the foregoing reasons, it is respectfully submitted that this Court should undertake the task of resolving the conflict resulting from the decision of the Court of Appeals below and define the constitutional limits of sufficiency of evidence in the context of this case.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS RENDERED AN OPINION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS.

Petitioner contended on appeal that the District Court clearly abused its discretion in refusing to grant Petitioner's request, under Federal Rule of Criminal Pro-

cedure 14,[5] for severance, and that Petitioner was severely prejudiced by the "spill-over" effect of overwhelming evidence presented against his four co-defendants which had no relevance to Petitioner. The Court of Appeals affirmed Petitioner's conviction, holding that a disparity in evidence presented against various defendants in a joint trial does not entitle a defendant to severance. (App. B).

Petitioner respectfully submits that the holding of the Court of Appeals is a gross oversimplification of the law which ignores the circumstances of this case and conflicts with the decisions of the District of Columbia and the Second Circuit, both of which have held that a substantial disparity of evidence in the context of a multi-defendant trial *may* in fact require severance where there is a strong likelihood of prejudicial spill-over. It is further submitted that the conflict created by the Court of Appeals for the Third Circuit raises due process issues of a most serious nature, worthy of the attention of this Court.

As described in the Statement of the Case, *supra,* Petitioner was one of five defendants charged in a 17 count indictment involving conspiracy and substantive offenses in connection with a city-wide scheme by Philadelphia police officers to extort over $130,000 from various businesses in return for protection from "police harrassment." Petitioner was named only in the one conspiracy count and the Government conceded that neither its theory of the case nor its evidence demonstrated that Petitioner was involved in extorting, requesting, or receiving any money.

During trial, the Government introduced some 28 "victim" witnesses, each testifying as to how he/she was

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5. Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows: "If it appears that a defendant or the govenment is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

harrassed and extorted by Petitioner's co-defendants. None of the witnesses testified that Petitioner had ever asked for or otherwise received any money, but the obvious "spill-over" effect of such evidence was devastating. In connection with this evidence, the Government also presented scores of incriminating documents, none of which had anything to do with Petitioner. Finally, Petitioner's alleged role during the term of this 18 month escapade of extortion was minuscule in comparison to the involvement of his four co-defendants. During the course of the resulting three week trial, Petitioner only "popped up" for a brief period at the beginning, when he apparently "vouched" for informer Hersing to DeBenedetto, and toward the end, when, in a taped discussion, co-defendants Smith and DeBendetto told informant Hersing that Petitioner was merely a "social friend" having nothing to do with their "business." (T — 2-55, 56).

The Court of Appeals, without considering any of the above circumstances, was content to hold that a disparity in evidence against co-defendants does not required severance. Petitioner submits, however, that the matter is not so simple.

This Court long ago articulated its concern over the dangers inherent in multi-defendant trials where evidence is highly disparate:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that birds of a feather are flocked together." *Krulewitch v. United States,* 336 U.S. 440, concurring Opinion at 454 (1949).

Other Circuits have since recognized these concerns in holding that "a disparate quantum of evidence against each of two defendants *may require severance* under some circumstances," *United States v. Gambrill,* 449 F.2d 1148, 1159 (D.C. Cir. 1971) (Emphasis

added), particularly where the evidence against co-defendants is "far more damaging" than against the moving party. *McHale v. United States*, 398 F.2d 757, 758 (D.C. Cir.), *cert. denied*, 393 U.S. 985 (1968).

In *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976), the District of Columbia Circuit reversed the defendant's conviction for conspiracy to obstruct justice, holding that the danger of prejudicial "spill-over" was so great that the trial court's failure to grant severance amounted to an abuse of discretion. The defendant Mardian was tried along with three other defendants for conspiracy to impede a Grand Jury investigation into the infamous Watergate break-in. While the evidence against Mardian was certainly sufficient to go to the jury, the court noted that it "was not as strong as the evidence relating to the other three defendants who were convicted." *Id.* at 976. Unlike the other defendants, Mardian was named only in the one conspiracy count, and of the 45 overt acts alleged in that count, only 5 involved Mardian, whose role in the conspiracy ended soon after its inception.

In reversing the conviction, the court stated that a substantial disparity of evidence in the context of a multi-defendant conspiracy trial required severance, notwithstanding the trial court's broad discretion, because the danger of improper "transferance" of guilt is greatly increased in such circumstances:

> "In applying this well established rule, (that the trial court has broad discretion in deciding severance motions), however, courts have always kept in mind the problems inherent in a trial of conspiracy cases involving numerous defendants. The Supreme Court has long recognized that in such cases 'the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant.' *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680 (1942). The 'dangers of transference of guilt' are such that a court should use 'every safeguard to individualize each defend-

ant in his relation to the mass.' *Kotteakos v. United States*, 328 U.S. 750, 774, 773, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946). *See, Blumenthal v. United States*, 332 U.S. 539, 559-560, 68 S.Ct. 248, 92 L.Ed. 164 (1947).

Particularly where there is great disparity in the weight of the evidence, strongly establishing the guilt of some defendants, the danger persists that that guilt will improperly 'rub off' on the others. United States v. Kelly, 349 F.2d 720, 756-759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed. 2d 544 (1966). In *Kelly*, the Court of Appeals for the Second Circuit emphasized that severance is among the most important safeguards available to minimize the risk of prejudice, and it ordered a new separate trial for the one alleged coconspirator who was disadvantaged by the disproportion in the evidence. *Id.* at 756. *See, United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971). *This court has often expressed its acceptance of the rule announced in Kelly, requiring severance when the evidence against one or more defendants is 'far more damaging' than the evidence against the moving party.*" (Emphasis added). *Id.* at 977.

The Government in the present case attempted to distinguish *Mardian* on the ground that one of the factors leading to the court's decision therein was the absence of Mardian's chosen counsel at trial due to illness. (App. D). Petitioner submits that while this incident strengthened Mardian's argument, the court's powerful language, *supra*, leaves no doubt of its decision that severance must be granted "when the evidence against one or more defendants is far more damaging than the evidence against the moving party." *United States v. Mardian, supra*, at 977.

In the present case, Petitioner stands in the same place as did the defendant in *Mardian*. As in that case, Petitioner herein was named in only one count of a multi-count indictment. His role in relation to the activi-

ties of his four co-defendants was extremely limited, and a great majority of the Government's evidence centered upon events which had nothing whatever to do with Petitioner. Under these circumstances, Petitioner suffered under the same impediments which caused the *Mardian* court to reverse the conviction.

The District of Columbia Circuit was not the only one to perceive and consider the prejudice inherent in circumstances such as the one before this Court. In addition to *Mardian*, and the cases cited therein, the Second Circuit, in *United States v. Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied* in *Lacey v. United States*, 393 U.S. 1029 (1969), recognized that:

> "It is obvious that as the number of counts is increased, the record becomes more complex and it is more difficult for a juror to keep the various charges against the several defendants and the testimony as to each of them separate in his mind . . . .
>
> *This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants.* The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, 'the mounting proof of the guilt of one is likely to affect the other.' " (Emphasis added; citations omitted). *Id.* at 887-888.

This is precisely what occurred in the case at bar, and the District Court's attempt to compartmentalize the evidence at the end of trial came too late to undo the damage resulting from prejudicial spill-over. As this Court stated in *Blumenthal v. United States*, 332 U.S. 539, 559 (1947):

> "Perhaps even at best the safeguards provided by clear rulings on admissibility, limitation of the bearing of evidence against particular individuals,

and adequate instruction, are insufficient to ward off the danger entirely."

In view of the foregoing, Petitioner submits that the Opinion of the Third Circuit Court of Appeals is in conflict with the decisions of the District of Columbia and Second Circuits, and with the concerns voiced by this Court in *Blumenthal* and *Krulewitch, supra,* to the extent that it fails to recognize that a disparate quantum of evidence in a multi-defendant trial may be, and in this case was, sufficient to require severance. The Third Circuit's present stance in requiring something more, is a blanket denial of Due Process deserving the close scrutiny of this Honorable Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

JEFFREY M. MILLER, ESQUIRE
Attorney for Petitioner
Abe R. Schwartz

APPENDIX

United States of America vs.

United States District Court for EASTE DISTRICT OF PENNSYLVANIA

DEFENDANT: ABE R. SCHWARTZ

DOCKET NO. 83-66-5

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date William B. Lytton,Esq. (MONTH 08 DAY 01 YEAR 83)

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jeffrey Miller,Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of

Conspiracy to violate the Hobbs act. Ct.1

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years. The defendant is to pay a fine in the amount of $10,000.00 (Ten Thousand Dollars.)

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

John B. Trulliam

Date June 1, 83

A TRUE COPY
ATTEST
STEPHEN J. IANNACE
8/1/83

APPENDIX A

A-1

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1609

UNITED STATES OF AMERICA
v.
SCHWARTZ, ABE R.
Abe R. Schwartz, *Appellant*

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Crim. No. 83-00066-05)

District Judge: John P. Fullam

Submitted Under Third Circuit 12(6)
March 9, 1984

Before: ALDISERT and HIGGINBOTHAM, *Circuit Judges*, and PECK,* *Circuit Judge*.

(Filed March 12, 1984)

MEMORANDUM OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

Appellant appeals from a sentence imposed on a conviction of guilty of one count of conspiracy to violate the Hobbs Act, 18 U.S.C. §1951. Appellant, a Philadelphia police detective for some 41 years, was indicted with other police officers. It was alleged that appellant and his four co-defendant police officers conspired to use their official positions to extort payoffs from illegal businesses in return for allowing the businesses to operate free from police harassment.

*Honorable John W. Peck, of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

His appeal presents four questions for review. He first argues that there was insufficient evidence to support his conviction. We are satisfied that the evidence was sufficient. See Brief for Appellee at 15-19.

Appellant next contends that the court abused its discretion by not granting his motion for severance. It is a settled precept in this court that granting a severance rests within the discretion of the trial court and requires consideration of the likelihood of a co-defendant testifying, the degree to which such testimony would be exculpatory, the degree to which the testifying co-defendant could be impeached, and judicial economy. *United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, ____ U.S. ____ (51 U.S.L.W. 3442, Dec. 6, 1982). The general rule in a conspiracy case is that the defendants indicted together should be tried together so that all the facts of the conspiracy may be developed. *United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1982), *cert. denied*, ____ U.S. ____ (51 U.S.L.W. 3757, Apr. 18, 1983). This court will overturn a denial of a motion for severance only upon a showing of prejudice. *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). Initially, there is a question whether this issue was properly preserved at trial. There was an early motion for severance but it was agreed that the court need not rule on it until receiving the government's trial memorandum and a separate memorandum providing the independent evidence of appellant's participation. His counsel did not request a ruling from the district court on the issue and there does persist a question of whether he abandoned the motion. Nevertheless, we will consider the issue as one that was properly preserved. We are persuaded that there was no abuse of discretion and are confident that the jury was able to separate the evidence introduced against the various co-defendants. A defendant is not entitled to a severance merely because evidence against a co-defendant is more damaging evidence than against him. *United States v. Somers, supra.*

Appellant contends that the trial court erred in admitting out-of-court statements of police officer George Woods. He argues that this was inadmissible hearsay and makes a vague reference that the testimony violated the confrontation clause of the sixth amendment. In appellant's brief, reference is made to six times when the confrontation was raised at trial. We have examined those pages and find that none of the objections make a specific reference to the confrontation clause. It can be argued that the testimony was admissible under Rule 801(d)(2)(8) of the Federal Rules of Evidence, Statement of Co-conspirator, yet we need not meet this challenge as well. Because the statements of Officer Woods did not seek to implicate the appellant in the specific conspiracy with which he was charged, we find no prejudice and therefore no trial error.

Finally, appellant argues that the court abused its discretion in considering the extent of Schwartz's assets at sentencing. The district court requested defense counsel to comment on the assets accumulated by the defendant, amounting to approximately $300,000 in current value. We find no error here because the inquiry was relevant on the question of whether a fine should be assessed. Moreover, the district court carefully stated his recognition that any sentence based on crimes not charged or proven would be improper and that the sentence imposed was only "for the crime which has been charged and proven." App. at 121a.

We have carefully considered all the contentions presented by the appellant.

Accordingly, the judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL
v.
JOHN DeBENEDETTO, et al. : NO. 83-66

MEMORANDUM AND ORDER

FULLAM, *J.* July 8, 1983

The defendant John DeBenedetto was an inspector in the Philadelphia Police Department, and the officer in charge of the Central Detective Division. The defendant John Smith was a lieutenant in the Philadelphia Police Department, and DeBenedetto's second-in-command. The defendants Vincent McBride and Lawrence Molloy were Philadelphia police officers assigned to the "inspector's squad" in the Central Police Division. The Defendant, former detective Abe Schwartz, was not assigned to the Central Detective Division, but rather was in charge of the program for clearing persons for issuance of gun permits, throughout the City of Philadelphia. He was, however, a long-time friend of both DeBenedetto and Smith.

All five of these officers were indicted, and have been convicted by a jury, on charges of extortion and conspiracy, for carrying out a systematic program of receiving large financial payments in exchange for permitting illegal prostitution and gambling. The money was paid by proprietors of massage parlors which operated as fronts for prostitution, and by bar-owners or vending-machine companies (in order to operate after-hours, and/or to permit their customers to use video-poker machines for gambling).

The evidence at trial clearly established that all of the defendants except Schwartz actively participated in the extortion scheme, received cash payoffs, etc. The contention of these defendants that the evidence was insufficient to sustain the verdict is absurd.

With respect to the Defendant Schartz, it is reasonably clear that he did not directly participate in the scheme, and did not receive any of the money. But the evidence established that Schwartz was fully aware of the extortion scheme and played an active role in helping it to succeed. For example, he advised one of the massage parlor operators (the government's informer, Hersing, as to how best to carry on his prostitution enterprise without police interference; introduced Hersing to the Defendant DeBenedetto to initiate the payoff arrangements, and vouched for Hersing's reliability in that connection; and acted as intermediary between Hersing and DeBenedetto and Smith, when Hersing missed some payments. For his trouble, Schwartz received from Hersing a gift of a Betamax video recorder, and the sexual services of one of Hersing's prostitutes. The Betamax may have been merely a gesture of friendship, unrelated to the extortion scheme, but the sexual favors plainly were a form of payoff. Schwartz was charged only with conspiracy; the evidence amply supports his conviction on that count.

Various defendants argue that their pretrial motions for severance should have been granted, and that they were unfairly prejudiced by being tried jointly with the other defendants. It is true that there was much more direct evidence against certain defendants (*e.g.*, DeBenedetto, Smith and Schwartz) than against others (particularly McBride and Molloy). But virtually all of the evidence which was received would have been relevant and admissible at the separate trials of each of the defendants, including Molloy and McBride. The joint trial was therefore proper, and none of the defendants was prejudiced as a result.

In my view, the co-conspirator's statements were properly admitted in evidence. Moreover, to the best of my recollection, no hearsay evidence of co-conspirator statements was received (*i.e.*, no such statement was received as proof of the truth of the facts contained in the statement).

The only other issues meriting brief discussion relate to the court's pretrial rulings on suppression of evidence. The grand jury which was considering this case issued a "forthwith" subpoena *duces tecum*, directed to the Philadelphia Police Commissioner, requiring production before the grand jury of the contents of the desks and lockers of certain named police officers, including some of these defendants. The police commissioner and his designated representatives fully cooperated with the grand jury, the FBI, and the U. S. Attorney's office in complying with this subpoena. In a pretrial ruling, I concluded that the net effect of this operation was a warrantless search and seizure, for purposes of Fourth Amendment analysis.

Evidence obtained as a result of the subpoena process included (1) a list of payoffs, obtained in search of the locker assigned to the defendant Smith; and (2) the contents of DeBenedetto's desk, some of which represented Police Department records, and some of which were DeBenedetto's personal papers. I ruled pre-trial that only Smith and DeBenedetto had standing to seek suppression of these materials; that Smith had no legitimate expectation of privacy with respect to the contents of his locker, in view of police regulations governing the permissible contents of lockers and expressly authorizing inspection at any time and precluding exclusive control over access to the lockers; and, in any event, that both Smith and DeBenedetto had consented to the search. I further expressed the view, however, that the Government was on much firmer ground with respect to the document found in Smith's locker than it was with respect to the contents of DeBenedetto's desk; and I venture the suggestion that the Government might do well to weigh carefully the need for his evidence at trial against the risk of appellate reversal.

As it turned out, only the document retrieved from Smith's locker was introduced in evidence at trial. I adhere to my pretrial ruling that the motion to suppress this evidence was properly denied. It should be noted, however, that its significance was quite minimal, in view

of the overwhelming nature of the Government's other evidence.

There neither is, nor could be, any serious contention that any of the Government's evidence flowed from, and might have been painted by, the documents obtained from DeBenedetto's desk (if, contrary to this Court's earlier ruling, that seizure was unlawful). Contrary to the suggestion of defense counsel, I have no occasion in this case to consider the possibility that such taint might infect other pending or prospective indictments.

I have carefully considered all of the arguments raised in the defendants' post-trial motions. I have concluded that the defendants were fairly tried, and properly convicted. All post-Trial motions will therefore be denied.

JOHN P. FULLAM, *J.*

APPENDIX D

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT SCHWARTZ' CONVICTION FOR CONSPIRACY TO VIOLATE THE HOBBS ACT.

Schwartz concedes that the evidence presented by the government proved that there was a conspiracy among his four co-defendants to collect pay-offs in return for protection from police interference in unlawful activities (Brief at 7-8). On this appeal, however, Schwartz contends that there was insufficient evidence linking him to the conspiracy.

In evaluating Schwartz' claim that there was insufficient evidence to support the jury's verdict, this Court must view the evidence and all the reasonable inferences that may be drawn therefrom in a light most favorable to government, and determine whether there was substantial evidence to support a finding of guilty beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Sturm*, 671 F.2d 749, 751 (3d Cir.), *cert. denied*, 51 U.S.L.W. 3255 (1982). Once the government has proven the existence of a conspiracy, as conceded by Schwartz, slight evidence is sufficient to connect a defendant with it. *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Moraites*, 456 F.2d 435 (3d Cir.), 409 U.S. 891 (1972); *United States v. De Cavalcante*, 440 F.2d 1264, 1273 (3d Cir. 1971). However, the government's evidence must be sufficient to show, at minimum, that the defendant had knowledge of the conspiracy's illicit purpose and performed acts in furtherance of the conspiracy. *United States v. Provenzano, supra*; *United States v. Klein*, 515 F.2d 751 (3d Cir. 1975). The evidence presented in this case was more than adequate to show, beyond a reasonable doubt, that Schwartz was aware of the illicit purpose of the extortion conspiracy and that he acted in furtherance thereof.

Schwartz was well aware of the fact that Hersing's studio was, in fact, a front for a prostitution operation. In fact, Schwartz received "sexual favors," or prostitutes, from Hersing (App. 71a-72a). Schwartz also knew that Hersing was making pay-offs to Woods for protection from arrests at the studio (Supp. App. 89a-91a). Furthermore, Schwartz was instrumental in bringing Hersing and DeBenedetto together so that Hersing could make his protection payments to the "right" person. Knowing that Hersing was dissatisfied because the arrests continued, Schwartz advised Hersing to speak with the "head man," DeBenedetto, and agreed to make the arrangements (Supp. App. 92a). After speaking with Schwartz, Hersing received a message to call DeBenedetto (Supp. App. 95a). Hersing subsequently arranged to make his payments to DeBenedetto through Smith, rather than Woods (Supp. App. 105a-106a). Prior to this meeting, Schwartz had already advised DeBenedetto that Hersing was making pay-offs to Woods (Supp. App. 104a). Schwartz had also recommended and vouched for Hersing to DeBenedetto (Supp. App. 103a). DeBenedetto would not have conducted any business with Hersing but for the recommendations that Hersing received (Supp. App. 160a). After Hersing made the necessary arrangements with DeBenedetto, Schwartz continued to advise Hersing on how to do business with DeBenedetto, acted as an intermediary between Hersing and DeBenedetto when problems developed between them and relayed information to Hersing from DeBenedetto. Thus, the evidence presented to the jury and the reasonable inferences therefrom amply demonstrated that Schwartz was both aware of the on-going conspiracy and its purpose, and participated in the conspiracy by engaging in efforts to bring Hersing and DeBenedetto together and by doing his best to ensure that the scheme ran smoothly, at least as to Hersing.

Schwartz argues that he received nothing "of value" from the conspiracy (Brief at 15). The government is not required to prove, as an element of the offense of conspiracy to violate the Hobbs Act, that Schwartz received

money or something of value as a result of his participation in the conspiracy. There was, however, sufficient evidence to infer that Schwartz received "sexual favors" from Hersing during the conspiracy (Supp. App. 92a-93a). As stated by Schwartz to Hersing, sex was all he really wanted for his assistance (Supp. App. 92a).

Finally, Schwartz argues that the fact that on March 4, 1982, DeBenedetto told Hersing that Schwartz was not involved in their business demonstrates that Schwartz was not, in fact, involved in the conspiracy (Brief at 17). However, the March 4th meeting was a session at which DeBenedetto and Smith browbeated Hersing for missing payments and for the unsatisfactory way that Hersing had conducted business with them. DeBenedetto was particularly disturbed about Hersing's use of names (Supp. App. 160a). Hersing brought up Schwartz' name when DeBenedetto and Smith were criticizing Hersing for moving the studio and making $30,000.00 worth of renovations without telling anyone (Supp. App. 162a). The fact that DeBenedetto denied Schwartz' involvement at that time may have been a result of DeBenedetto's dissatisfaction with Hersing for bringing up Schwartz' name. Moreover, even if DeBenedetto's comment is taken at face value, Schwartz' involvement in the conspiracy was well supported by the evidence presented by the government.

Schwartz' reliance on *United States v. Moses*, 220 F.2d 166 (3d Cir. 1955), a case in which the defendant was charged with aiding and abetting in the sale of narcotics, is misplaced. The Court in *Moses* held that the defendant's introduction of two undercover federal agents to a supplier who was on his way over to the defendant's home and her vouching for the prospective buyers to the supplier was insufficient to support conviction for aiding and abetting the seller. This holding was based, in part, on the fact that the relevant statutory law did not prohibit general participation in a drug transaction and the fact that the defendant was charged with aiding and abetting in the sale, and not the purchase of drugs. *Id.* at 168. Assuming, *arguendo*, that the analysis

in *Moses* is relevant to a conspiracy case, unlike the situation in *Moses*, Schwartz' participation far exceeded a simple introduction and vouching for Hersing. In *United States v. Atkins*, 473 F.2d 308 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973), the Eighth Circuit distinguished the facts in *Moses* from the facts in *Atkins*. In *Atkins*, the appellant had acted affirmatively to bring the buyer and seller together and had remained interested in the purchase after the sale was consummated. Although the facts in *Moses* are quite different from those in the instant case, that opinion and the *Atkins* opinion reveal that the *Moses* analysis is inapplicable to the facts presented in this case. Here, Schwartz engaged in affirmative conduct to facilitate the payment of money by Hersing to DeBenedetto and remained interested and involved in the relationship after the deal was made.